No. 91-1382

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THE SHUBERT ORGANIZATION, INC., *et al.*,

Petitioners,

—v.—

LANDMARKS PRESERVATION COMMISSION OF THE CITY OF NEW YORK, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT, APPELLATE DIVISION
FIRST JUDICIAL DEPARTMENT OF THE STATE OF NEW YORK

MOTION AND BRIEF OF THE REAL ESTATE BOARD OF NEW YORK, INC. AMICUS CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI

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MOTION OF THE REAL ESTATE BOARD OF NEW YORK, INC. FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI

The Real Estate Board of New York, Inc. (the "Board") respectfully moves this Court for leave to file the accompanying *amicus curiae* brief in support of the petition for certiorari.

Petitioners herein have consented to the filing of this brief, and defendants-respondents have no objection. Their letters to that effect have been lodged with the Clerk. Only the intervenor-defendant-respondent (itself ordinarily an amicus below) has declined to consent, necessitating this motion.

Interest of the Real Estate Board of New York, Inc. as Amicus Curiae

The Board is a New York association founded in 1896 consisting of those involved in the real estate industry, including property owners, developers, lenders, managers, brokers, etc. Its current membership consists of approximately 4500 firms and individuals. Most of its members own property in New York City and the surrounding metropolitan area of New York, in addition to many who own interests in real property throughout the United States and the world.

The Board has a philosophical commitment to the traditional respect our society affords to private property and private property rights. On a more practical level those Board members who are concerned on a daily basis with questions involving the ownership and operation of real property in New York have a strong interest in seeing that the laws affecting real property and its administration are reasonable, clear, of relatively easy application, and capable of operating at high levels of predictability. Therefore, the Board has a substantial interest in decisions that will have an impact upon real property law in general and particularly with respect to the regulation of land use and development involving zoning, code enforcement and other aspects of real estate regulation under the police power and, in the present situation, including landmarks and historic district preservation as it is currently operating in the City of New York.

It should be noted at the outset that the Board filed a brief *amicus curiae* in the case of *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978), in January 1978 setting forth its views as to the impact of that case upon the subject of historic district and landmarks preservation in the City of New York. The decision in that case was the first, and to this date remains the sole, statement on that subject by this Court, and it is submitted, in view of the widespread activity in the field and the differing fact situation in this case, merits review by this Court at this time.

Reasons for Granting the Motion

It is the opinion of the Board that if the legal analyses and conclusions of the New York courts in this case are allowed to stand, it will continue to subject real property to governmental restraints which in many instances constitute a taking of property or deprive property of its value without compensation, introducing thereby large areas of uncertainty and unpredictability into the ownership and operation of real estate. These unsettling effects of the decision of the New York courts in this case will be felt in landmarks and historic district preservation and other related fields of law, inasmuch as the decision transcends the interests of the litigating parties and applies to a large number of properties in the city. Consequently the Board urges this Court to grant this motion and the petition for certiorari so that the Court may consider the basic constitutional validity of the actions of the government in this area and the views of the New York courts as to the validity of those actions.

Respectfully submitted,

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April 24, 1992

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BRIEF OF THE REAL ESTATE BOARD OF NEW YORK, INC., AS AMICUS CURIAE, IN SUPPORT OF THE PETITION

Preliminary Statement

The Real Estate Board of New York, Inc. (the "Board") submits this brief as *amicus curiae* in support of the petition dated February 22, 1992 of petitioners The Shubert Organization, Inc. et al for a writ of certiorari to review the May 16, 1991 decision and order of the New York Supreme Court, Appellate Division, First Judicial Department, which affirmed the judgment of the *nisi prius* Court dismissing petitioner's Article 78 (mandamus) proceeding and the complaint in an action for declaratory judgment.

The interest of the Board as amicus is set forth in the preceding motion for leave to file this brief.

Reasons for Granting the Writ

The statement of the case, the opinions below, the jurisdictional statement, and the constitutional and statutory provisions are adequately set forth in the petition for *certiorari* and consequently will not be repeated here.

When the New York City Landmarks Preservation Law (NYC Charter Chapter 74, Section 3020; NYC Admin. Code Title 25 Sections 25-301 through 321) was enacted in 1965, it represented one of the most comprehensive statutes in the United States dealing with the designation and preservation of landmarks and historic districts.[1]

At that time doubt existed as to the basic issue of the degree to which regulation by governmental authorities under the police power was so excessive as to constitute a "taking" requiring a nullification of the ordinance or the payment of just compensation under the provisions of the 5th and 14th Amendments of the United States Constitution or the coordinate provisions of the constitutions of the several states. Although determinations of lower courts were made affirming the validity of the statute, there were some holdings declaring actions of the Landmarks Preservation Commission (created by the NYC Charter Chapter 74 § 3020) invalid as applied.[2] However, this Court has since 1978 dealt with a series of cases involving the basic issue of the scope of police power regulation, but in no instance did it consider the generic subject of landmarks and historic district preservation.[3]

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1 Morris, *Historic District and Landmarks Preservation*, 2A Warren's Weed New York Real Property (Matthew Bender & Co.).

2 *French Investing Company, Inc. v. City of New York*, 39 N.Y.2d 587, 385 N.Y.S.2d 5, *appeal dism'd*, 429 U.S. 990 (1976); *Lutheran Church in America v. City of New York*, 35 N.Y.2d 121, 359 N.Y.S.2d 7 (1974); *In the Matter of Keystone Associates v. Moerdler*, 19 N.Y.2d 78, 278 N.Y.S.2d 185 (1966).

3 *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 672 (1987); *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987); *Hodel v. Irving*, 481 U.S. 704 (1987); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *United States v. Cherokee Nation*, 480 U.S. 700 (1987); *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S.

Predicated upon the holding by the majority of this Court in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), it appears that both federal and state courts have accepted, as resolved facially, the basic constitutional validity of landmarks and historic district statutes. These decisions seem to have been made in disregard both of *Penn Central's* insistence upon the necessity of a factual analysis of the takings issue, and of the results of the analysis actually there undertaken—the historic use of Grand Central Terminal was not interfered with by the designation, and rights conceded to be valuable were afforded by reason of the designation. The state and lower Federal Court decisions have also ignored all the observations found in the dissenting opinion in *Penn Central* written by Justice (now Chief Justice) Rehnquist and concurred in by Chief Justice Burger and Justice Stevens.[4]

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340 (1986); *City of Cleburne v. Cleburne Living Center Inc.*, 473 U.S. 432 (1985); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Andrus v. Allard*, 444 U.S. 51 (1979); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). *See generally* Morris, *Monetary Damages as a Remedy*, 52A Rohan, Zoning and Land Use Controls (Matthew Bender & Co.).

In addition, the case of *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895 (S.C. 1991), *cert. granted* November, 1991, is currently *sub judici* before this Court.

4 A recent case which seems to challenge the broad acceptance of the holding by the majority in *Penn Central* is *United Artists Theatre Circuit v. City of Philadelphia*, 125 Pa. Comm. 520, 558 A.2d 155 (1991). In that case the Supreme Court of Pennsylvania reversed the lower courts' holdings that the designation of the Boyd Theatre in Philadelphia as a landmark under the provision of the "Historic Buildings, Structures, Sites, Objects and District" provisions of the Philadelphia Code (§ 14-2007) was proper. It held that the designation, without the consent of the owner, was "unfair, unjust and amount to an unconstitutional taking without just compensation in violation of Article I § 10 of the Pennsylvania constitution." Reargument of the case was

Summary of Argument

This case again[5] presents for evaluation by this Court the basic issue of when may regulation by a municipality, exercised under the guise of the police power, be so excessive as to constitute a taking for public use which, to validate the action, requires the payment of just compensation under the Fifth and Fourteenth Amendments to the Constitution of the United States or alternatively are facially violative of the rights of owners of real property.

The enactment by the municipality (the City of New York) of the Landmarks Preservation and Historic Districts Act *supra* authorizes *inter alia* the Landmarks Preservation Commission ("LPC") to destroy valuable property rights by the designation of property as a landmark. These valuable property rights include the right to possess, use and dispose of property (frequently characterized as the bundle of rights which inhere in ownership of real property in fee simple) which can be subjected, by the designation to a nonconsensual servitude requiring it to be maintained in its present state forever, unless it is permitted to make changes by the grace of the LPC. This action by government should constitute a taking unless it is exercised under (1) the nuisance exception, (2) a circumstance where the taking secures "an average reciprocity of advantage"[6] as in the case of zoning,[7] (3) a proper and reasonable exercise of regulation under the police power for the health, safety, morals and general welfare of the public,[8] or (4) where just compensation is paid to the owner

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allowed on December 6, 1991 and is *sub judici* as of the time of this writing. Moreover, as it stands, the decision is unclear as to whether it is a holding which declares the statute "facially" unconstitutional or merely invalid "as applied".

5 Note 3 *supra*.

6 *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

7 *Euclid v. Ambler Realty Company*, 272 U.S. 365 (1926).

8 *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978).

under the Fifth and Fourteenth Amendments by the government where the property has been taken for a public purpose or a public use.[9]

It is within the scope of these legal doctrines that this case should be viewed; a basis which the state courts have failed to do. The nuisance and zoning exceptions have no application here, and consequently need not be dealt with in this brief. However the doctrines of the extent of the police power and the just compensation principles of law are clearly implicated.

ARGUMENT

UNDER ANY ASPECT OF THE POLICE POWER THE ACTION OF THE COURTS BELOW CANNOT BE SUSTAINED

In *Yee v. City of Escondido*, 112 S.Ct. 294 (1992) (unanimous decision with two concurring opinions), this Court succinctly stated the current status of the law relevant to the police power as follows:

> "The Takings Clause of the Fifth Amendment provides: 'Nor shall private property be taken for public use, without just compensation.' Most of our cases interpreting the Clause fall within two distinct classes. Where the government authorizes a physical occupation of property (or actually takes title), the Takings Clause generally requires compensation. See, e.g., Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982). But where the government merely regulates the use of property, compensation is required only if considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole. See, e.g.,

9 *Berman v. Parker*, 348 U.S. 26 (1954).

> Penn Central Transp. Co. v. New York City, 438 U.S. 104, 123-125 (1978). The first category of cases requires courts to apply a clear rule; the second necessarily entails complex factual assessments of the purposes and economic effects of government actions."

In this case there is no claim of a *per se* taking as a consequence of a physical occupation of the property. Instead it deals exclusively with the regulation of the property and involves factors concerning the constitutionality of the statute both facially and as applied under the facts of the case which limits and impairs the use of the property and unfairly burdens the owners of it.

Thus, the core of the police power as it is involved in this case is concerned with the safety and welfare of the community. However, a property designated under a police power statute is required to assure a reasonable return and does not, through the coercion of affirmative acts, compel the burden of the designation to fall disproportionately on a single property owner. Where action is taken at a community level, which necessarily diminishes the value of property because it may not be used for the forbidden purposes, it must nevertheless assure that the owner is able to earn a reasonable return on the property. In addition, where the general benefit of all the people is served, this Court has held that the government may not load "upon one individual more than his just share of the burdens . . . when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him."[10]

Thus, where the statute inadequately provides for these requirements it impermissibly invades the rights of the owner and constitutes a facial violation of the police power authority.[11] It will be established below that the New York Land-

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10 *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893).

11 *Seawall Associates v. City of New York*, 74 N.Y.2d 92, 544 N.Y.S.2d 542, *cert. denied*, 110 S. Ct. 500 (1989).

marks Preservation and Historic Districts Act fails to meet these standards and, as a consequence, is facially invalid and must be stricken. It will also be established that even if it is found that facially the statute is sustainable, the facts involved in this case render it invalid "as applied" and as a result it should be stricken, as well.

1. Facial Invalidity

In considering the validity under the police power of a statute on its face, two elements are involved. The first and most fundamental is the issue of whether the burden associated with the desire of a municipality to preserve privately owned real estate as a landmark should be borne by the individual owner or by the taxpayers of the community at large, all of whom purportedly enjoy the enhanced lifestyle associated with the preservation of specific parcels of real estate as landmarks, i.e. the doctrine of the balancing of the equities. The second is whether the police power statute contains adequate provision for affording the owner the right to use the landmarked property in a manner which permits an adequate return on "investment backed expectations."[12]

(a) Balancing the Equities

Unlike zoning, which applies to and benefits all real estate, the landmarking of an individual parcel casts the entire diminution of value upon the owner and thus deprives that owner of the "average reciprocity of advantage" enunciated by Mr. Justice Holmes in *Pennsylvania Coal Co. v. Mahon.*[13] This reciprocity cannot exist where a property is singled out and treated differently from the properties surrounding it and from the others (not landmarked) in the community. Moreover, under the landmarks procedure specified by the New York statute there is imposed upon the designated property a nonconsensual servitude in perpetuity or an affirmative duty upon the owner to preserve the exterior (and in some

12 See note 8 *supra.*

13 260 U.S. 393 (1922).

instances the interior) solely at the owner's expense without any contribution from the benefitting public entity imposing the onerous regulation.

This Court has held categorically that government may not force some people to bear public burdens which should be borne by the public at large. *Armstrong v. United States*, 364 U.S. 40, 49 (1960). This burden is precisely what the City of New York is imposing upon private owners of landmarked properties and as such should be held to be facially invalid.[14] Accordingly, certiorari should be granted to afford this Court the opportunity to right the wrongs which have become endemic countrywide in requiring property owners to bear the full cost of preserving buildings of historic or architectural interest for the benefit of the public at large. This is particularly so where there are more feasible and equitable methods of accomplishing the same result such as the taking of restrictive easements or employing tax incentives to encourage private preservation of landmarks.

(b) Reasonable Return

The Court has held that even where the use of the restriction does not deprive the owner of all reasonable value of the property, the inability of the owner to make a reasonable return requires compensation under the Fifth Amendment of the United States Constitution. *United States v. Lynah*, 188 U.S. 470 (1903). Moreover, the use of the term "just compensation" employed in the language of the Fifth Amendment has been held to mean "a full and perfect equivalent

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14 The New York Court of Appeals did not hesitate to hold a parallel statute to be facially invalid in the case of *Seawall Associates v. City of New York*, 74 NY2d 92, 544 NYS 2d 542, *cert. denied*, 110 S.Ct. 500 (1989). In that case it invalidated a statute which compelled the owners of single room occupancy (SRO) buildings to be rehabilitated, adequately maintained and then rented out to low income tenants on a rent regulated basis. This holding of facial invalidity was arrived at on the theory that it was violative of the constitution to require individual owners to bear the full cost of subsidizing such tenants in order to benefit the City by assisting in taking care of its homeless and indigent tenants, a role which should properly be imposed upon all taxpayers.

for the property taken." *Monongahela Navigation Co. v. The United States*, 148 U.S. 312, 326 (1893). In the challenged New York statute no provision is made to allow for any compensation to the owner for the use deprivation involved. Thus, there is no provision in the statute making available the means to earn a reasonable return, and as a result the statute cannot pass constitutional muster.

It has been argued that the constitutional requirement for a reasonable return is met by the hardship definition set forth in NYC Admin. Code Section 25-302(v) which provides for a net annual return of 6% on the current assessed value established by the City or the sales price paid for the property under a number of prescribed conditions. However, this so-called reasonable return provision as contained in the New York statute in no way insures the owner of any return. It merely provides that, where the prescribed return cannot be made under the landmark restrictions, the City has the right, where all conditions of the definition are met, to allow tax abatement or the right to make certain specified types of alterations or as a last resort to require that the property be condemned by the City. It also provides that in the alternative if the City refuses to take the property in an eminent domain proceeding then it may permit demolition of the building. The relevant provisions of the statute are as follows:

> v. "Reasonable return." (1) A net annual return of six per centum of the valuation of an improvement parcel.
>
> (2) Such valuation shall be the current assessed valuation established by the city, which is in effect at the time of the filing of the request for a certificate of appropriateness; provided that:
>
> (a) The commission may make a determination that the valuation of the improvement parcel is an amount different from such assessed valuation where there has been a reduction in the assessed valuation for the year next preceding the effective date of the current assessed

valuation in effect at the time of the filing of such request; and

(b) The commission may make a determination that the value of the improvement parcel is an amount different from the assessed valuation where there has been a bona fide sale of such parcel within the period between March fifteenth, nineteen hundred fifty-eight, and the time of the filing of such request, as the result of a transaction at arm's length, on normal financing terms, at a readily ascertainable price, and unaffected by special circumstances such as, but not limited to, a forced sale, exchange of property, package deal, wash sale or sale to a cooperative. In determining whether a sale was on normal financing terms, the commission shall give due consideration to the following factors:

(1) The ratio of the cash payment received by the seller to (a) the sales price of the improvement parcel and (b) the annual gross income from such parcel;

(2) The total amount of the outstanding mortgages which are liens against the improvement parcel (including purchase money mortgages) as compared with the assessed valuation of such parcel;

(3) The ratio of the sales price to the annual gross income of the improvement parcel, with consideration given, where the improvement is subject to residential rent control, to the total amount of rent adjustments previously granted, exclusive of rent adjustments because of changes in dwelling space, services, furniture, furnishings, or equipment, major capital improvements, or substantial rehabilitation;

(4) The presence of deferred amortization in purchase money mortgages, or the assignment of such mortgages at a discount;

(5) Any other facts and circumstances surrounding such sale which, in the judgment of the commission, may have a bearing upon the question of financing.

(3) For the purposes of this subdivision v:

(a) Net annual return shall be the amount by which the earned income yielded by the improvement parcel during a test year exceeds the operating expenses of such parcel during such year, excluding mortgage interest and amortization, and excluding allowances for obsolescence and reserves, but including an allowance for depreciation of two per centum of the assessed value of the improvement, exclusive of the land, or the amount shown for depreciation of the improvement in the latest required federal income tax return, whichever is lower; provided, however, that no allowance for depreciation of the improvement shall be included where the improvement has been fully depreciated for federal income tax purposes or on the books of the owner; and

(b) Test year shall be (1) the most recent full calendar year, or (2) the owner's most recent fiscal year, or (3) any twelve consecutive months ending not more than ninety days prior to the filing (a) of the request for a certificate, or (b) of an application for a renewal of tax benefits pursuant to the provisions of section 25-309 of this chapter, as the case may be.

w. "Scenic landmark." Any landscape feature or aggregate of landscape features, any part of which is thirty years old or older, which has or have a special character or special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation and which has been designated a scenic landmark pursuant to the provisions of this chapter.

Aside from the highly circumscribed conditions under which the hardship provision can come into play and the limited relief it accords to an owner, the standard itself is patently unreasonable. Assessed valuations in New York City are currently and have for years been fixed at 45% of the fair market value of the property. Thus the 6% return amounts

to less than a 3% return based upon the City's own figures. Such a return, on so insecure a base, can scarcely constitute facially a reasonable return on the ownership of a highly speculative building which would be eligible for landmark designation, irrespective of its historical or aesthetic merits. Moreover, compliance with these "reasonable return" provisions which would entitle an owner to some benefits is a long, arduous process; in fact, in the seventeen-year history of the Commission relief has rarely been granted and is not likely to be in the future.

Thus, there is also a failure on the face of the statute to "provide for the reasonable return" required by this Court to withstand constitutional challenge.

2. Invalidity of the Action Under the Police Power as Applied

In the petition for certiorari dated February 25, 1992, under the heading "The Reasons for Granting the Writ" (at pp. 7-17), there is set forth in detail an argument dealing with "the question of the severity of the impact of the law on appellants' parcels" and an analysis is made of the actual impact of the statute upon the facts in this case. This argument is set forth effectively (although in summary fashion) and consequently need not be repeated in this brief, but it does establish clearly that even in the event this Court should determine that the New York statute is not vulnerable on the ground of its facial unconstitutionality, certiorari should nevertheless be granted so that it may be reviewed "as applied" to the twenty-two theatres involving thirty-nine designations by the Landmark Preservation Commission of the City of New York.

In considering the "as applied" impact of the challenged designations, this Court should make clear that where, as in this case, a property owner has made a prima facie evidentiary showing that a regulatory taking has occurred, the owner must be afforded a judicial factual assessment of the purposes (*cf. Nollan v. California Coastal Commission*, 483

U.S. 825 [1987]) and the economic effects (*cf. Penn Central, supra*) of the governmental action.

It should also be emphasized that (as is common knowledge) these are old obsolete theatres which constitute fire hazards and which are dark a good deal of the time. In addition, the designation of the interior of some of the properties will create serious difficulty in the staging of theatrical performances of a special nature such as "Cats", "Les Miserables", etc. which require major interior alterations. These alterations cannot be accomplished without the prior approval of the Landmarks Preservation Commission, a procedure (as illustrated by other types of alterations of this sort) which is not only difficult to obtain but involves a long and complicated process required for favorable action by the Commission. This problem is so serious that it could well result in the inability of the petitioners as owners of the theatres to put on performances of this type in New York which has traditionally, (along with London) been the live theatre center of the world.

The New York Courts in affirming the constitutional validity of the designations failed to give full consideration to these facts as applied and relied instead upon the determination of the majority in the *Penn Central* case, which merely held that, in *Penn Central*, there were mitigating circumstances which served to sustain the action of the Commission. These circumstances are not present in the case of the theatres designated in this case, and consequently this Court should grant certiorari.

Conclusion

THIS COURT SHOULD GRANT THE PETITION FOR CERTIORARI.

Respectfully submitted,

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